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THE BEGINNING OF THE END OF THE "SEPARATE BUT EQUAL" DOCTRINE

With the decisions handed down by the Supreme Court of the United States, at the close of its 1950 term, in the cases of Sweatt v. Painter¹ and McLaurin v. State Regents for Higher Education et al,² there is indicated the possibility, in the not too distant future, of the abandonment of the "separate but equal" doctrine,³ at least in the field of higher educational facilities provided by the States. The Supreme Court has not expressly overruled this doctrine, but has so interpreted the word "equality" in regard to the facilities provided by the respective States for the distinct races or groups in the field of higher education, as to render the States' attempts to comply with the "equal protection" clause of the Fourteenth Amendment of the Constitution impracticable.

In the past the Court's traditional reply to a question raising the constitutionality of the segregation practices in the fields of transportation and education, consisted merely in comparing the physical facilities offered to the respective groups by the States to determine whether equality was present as to the facilities so provided.⁴

Despite the abolition of slavery as an institution in the United States by the Thirteenth Amendment, the position of the negro race was not much better, and in some respects even worse, than its former status of slavery. State legislation curtailed and even abolished some of the rights which the negro race had obtained upon being released from slavery. Such legislation was so flagrant that the Fourteenth and Fifteenth Amendments were enacted and ratified as correctives, designed to protect and guarantee the freedom of the negro race.⁵ By these amendments, citizenship, both Federal and State, was defined; actions by a State which denied a person life, liberty, or property without due process of law, and which denied persons within a State's jurisdiction the equal protection of the laws of such State, were prohibited.

Despite such amendments, however, the States continued to deny equal

1. 339 U.S. 629 (1950).

2. 339 U.S. 637 (1950).

3. Established by the decision in Plessy v. Ferguson, 163 U.S. 537 (1896). State action granting equal facilities or privileges to separate races is not a denial of the equal protection clause of the Fourteenth Amendment of the Constitution.

4. Fisher v. Hurst, 333 U.S. 147 (1948); Sipuel v. Board of Regents, 332 U.S. 631 (1948); Missouri ex rel. Gaines v. Canada, 305 U.S. 337 (1938); Gong Lum v. Rice, 275 U.S. 78 (1927); McCabe v. Atchison, T. & S. F. Rwy. Co., 235 U.S. 151 (1914).

5. Slaughter-House Cases, 16 Wall. 36 (U.S. 1872); 2 Morison & Commager, The Growth of The American Republic 54 (Ed. 1937); Harlow, The Growth of the United States 33 (Ed. 1943).

rights to the negro race, according to the decisions of the Supreme Court. 6 These decisions gave negroes some assurance that the freedom which was constitutionally theirs would be freedom in fact.

States, by legislative enactments, required separation of the races in the use of public transportation facilities. Separate accommodations had to be provided by common carriers for members of the white and negro races. In deciding whether such legislation was a violation of the equal protection clause of the Fourteenth Amendment, the Court, in its decision in the Plessy v. Ferguson Case,⁷ upheld such legislation, stating that, as long as equal facilities were provided for the respective races, equal protection of the laws was not denied to anyone. The State might make a legal distinction between the races, provided the statute was enacted in good faith to promote the public good, and was not to annoy or oppress a particular group, and was reasonable.⁸

Three years later, in 1899, the Court, in handing down its decision in Cumming v. Richmond County Board of Education,⁹ moved backward even in regard to the application of the newly established "separate but equal" doctrine. The Court there held that the County Board might not be enjoined from collecting taxes and disbursing tax funds for an educational institution provided for white children, despite its refusal to continue to maintain a similar institution for the negro children. The Court stated that there was no denial of the equal protection of the laws inasmuch as similar facilities were provided such colored children by nearby private institutions.

But in 1938, the Court, in Missouri ex rel. Gaines v. Canada,¹⁰ held that the State itself must provide facilities for all, if it would provide such for any one group. The State might not shift its obligations to other States, nor to private institutions, within or without its borders. The States had to provide separate but equal facilities within their own borders. Separate but equal facilities might still be maintained, but there had to be substantial equality of such facilities furnished by the State within its own borders.

"The admissibility of laws separating the races in the enjoyment of privileges afforded by the States rests wholly upon the Equality of the privileges which the laws give to the separated groups within the state."¹¹

In Addition, the Court reiterated that the rights guaranteed by the Fourteenth Amendment were individual and present.¹² Having provided facilities to one group, the State could not avoid fulfilling its obligation to provide similar facilities to other groups merely because the number of persons of such other groups demanding the enjoyment of such facilities were too few to justify the expenditures involved in providing the facilities.

6. Smith v. Allright, 321 U.S. 649 (1944); Nixon v. Herndon, 273 U.S. 536 (1927); Hill v. Texas, 316 U.S. 400 (1942); Norris v. Alabama, 294 U.S. 587 (1935); Buchanan v. Warley, 245 U.S. 60 (1917); Strauder v. West Virginia, 100 U.S. 303 (1880).

7. 163 U.S. 537 (1896).

8. *Id.* at 550.

9. 175 U.S. 528 (1899).

10. 305 U.S. 337 (1938).

11. *Id.* at 349.

12. 305 U.S. 337, 351 (1938); McCabe v. Atchison, T. & S.F. Rwy Co., *supra* note 4.

Thus, the only alternative to non-segregative practices, regarding privileges afforded by the States to persons within their jurisdictions, was to provide substantially equal facilities for each group. Such a requirement necessarily threw upon the States a considerable financial burden, especially since the rights thus protected were held to be individual and present.

With the Gaines v. Canada Case, this interpretation of the equal protection clause of the Fourteenth Amendment, permitting separate but equal facilities, had been expanded to its limits. From an alleged violation of such an interpretation the Sweatt v. Painter and McLaurin v. Oklahoma Cases arose.

In Sweatt v. Painter, the State of Texas did in fact provide a separate law school for members of the negro race seeking legal training. There, the State, at the time the Court heard the case, had provided facilities which were thought by the State to be substantially equal to those of the University of Texas Law School. The school for the negroes had a permanent faculty, a library, practice court and legal aid association. There was an enrollment of twenty-three students, with one graduate a member of the Texas Bar. The Supreme Court held that such were not facilities establishing substantial equality in facilities offered the white and colored races:

"In terms of members of the faculty, variety of courses and opportunity for specialization, size of the student body, scope of the library, availability of law review and similar activities, the University of Texas Law School is superior. What is more important the University of Texas Law School possesses to a far greater degree those qualities which are incapable of objective measurement but which make for greatness in a law school. Such qualities, to name but a few, include reputation of the faculty, experience of the administration, position and influence of the alumni, standing in the community, traditions and prestige. It is difficult to believe that one who had a free choice between these law schools would consider the question close." 13

The Court expressly stated that it was not re-examining the Plessy v. Ferguson Case; that it was deciding the case before it upon the facts and circumstances therein. But is not the absence of some of these qualities the immediate result of a policy of segregation? The establishment of segregated institutions tends not only to continue, but also increase, this discrepancy between the facilities. Even if there would be an attempt to duplicate each facility, some of the qualities which the Court held to be incapable of objective measurement, could not be supplied at the time the separate facilities would be established. Since the right to equal protection is an individual and present right, the fact that in time the school may approach the reputation and prestige of the school previously provided the white race, would not meet the demands of such a right. Certainly, in a State whose population is predominantly white, where the outstanding majority of the members of the Bar is of the white race and are graduates of schools set aside for white students, equality can never be achieved by providing separate facilities to members of the negro race.

Even the difference in student enrollment in each school was considered in comparing the facilities of each school. In other words, the nature of education is such as requires the presence of other students.

13. Sweatt v. Painter, 339 U.S. 629, 633-4 (1950).

The question in the McLaurin v. Oklahoma Case, which was decided upon the same day as the Sweatt Case, was whether it was a denial of the equal protection of the laws under the Fourteenth Amendment to require a negro student to sit in classroom, cafeteria and library at places set apart from those used by the white students. The Court held that it was such a denial, saying:

“...the conditions under which this student is required to receive his education deprive him of his personal and present right to the equal protection of the laws.” 14

The Court further stated that as a result of this segregation, the student was handicapped in his pursuit of effective graduate instruction.

“Such restrictions impair and inhibit his ability to study, to engage in discussions and exchange views with other students, and, in general, to learn his profession.” 15

But to what extent did such segregative practices imposed by the State of Oklahoma provide unequal facilities? Certainly as to faculty, size and quality of the library and even of the cafeteria there were no inequalities. They were identical; they were the same facilities. The setting apart of the negro student so as to preclude discussions and the exchanging of ideas with fellow students and to inhibit his ability to study created the inequality; not because there was segregation, but because such segregation resulted in inequality. The nature of the facility in the circumstances precluded separation; for such separation had not denied the negro student the enjoyment of the physical aspects of the educational facility.

If the two cases are considered together, what one lacks the other supplies in answering in the affirmative the question whether segregation, at least in regard to the higher educational and professional facilities provided by a State, is unconstitutional. For in the Sweatt Case, certain qualities of educational facilities are incapable of attainment by such segregative practices; and in the McLaurin Case, segregation in the enjoyment of the same facilities results in such restrictions as to render unequal the facilities afforded to the negro student.

The only step remaining for the Court to take, in deciding the question whether there is an equal protection of the laws by the State providing separate facilities to distinct groups, is to hold that, in the very nature of separation of the races there is inequality.

In view of the development and progress of the members of the negro race in the United States since its emancipation from slavery, despite burdensome obstacles placed before them, it is difficult to understand the continued justification of legislation providing separate but equal facilities upon the ground of public interest. Possibly such legislation resulted from a valid exercise of police power in some States immediately after the Civil War. But legislation which was supposed to remove present dangers arising from prejudices, created situations tending to continue such prejudices. As early as the Plessy Case, which established the “separate but equal” doctrine, warning was given as to the result of such State legislation. Justice Harlan, in his dissenting opinion in the case, stated:

14. McLaurin v. Oklahoma, 339 U.S. 637, 642 (1950).

15. *Id.* at 640.

"The destinies of the two races, in this country are indissolubly linked together, and the interests of both require that the common government of all shall not permit the seeds of race hate to be planted under the sanction of law. What can more certainly arouse race hate, what more certainly create and perpetuate a feeling of distrust between these two races, than state enactments, which, in fact, proceed on the ground that colored citizens are so inferior and degraded that they cannot be allowed to sit in public coaches occupied by white citizens." 16

Justice Harlan went on to predict that the Court's decision would in time become as pernicious as the Dred Scott Decision. 17 Should one view the criticisms of this country abroad because of the continuance of segregative practices while it is striving to preserve and restore the rights of individuals and nations, and attempting to be a bulwark for a world order based upon inherent human rights, the prediction of Mr. Justice Harlan comes back to haunt us.

The Declaration of Independence recognized the fundamental equality of all men, that men are endowed by their Creator with inalienable rights. These rights come not from other individuals, nor from society, nor yet from a society's government. They are God-given rights, arising from the very nature of man. The dignity of man demands that each man respect such dignity in his fellow man.

When a State exercises its police power to set apart a group of people because of prejudices of a dominant group, such prejudices having initially created social inequality, the result is the enforcement of social inequality by law. That is unequal protection of the laws.

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16. Plessy v. Ferguson, 163 U.S. 537, 560 (1896) (Dissenting opinion).

17. 19 How. 382 (U.S. 1857).